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IN THE

Supreme Court of the United States

October Term, 1953

No. 493

JACQUES CODRAY, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General And Successor To The Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF CCLUMBIA CIRCUIT

DAVID COBB
Counsel for Petitioner

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Jacques Codray, *Petitioner*

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Herbert Brownell, Jr., Attorney General And Successor To The Alien Property Custodian, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Jacques Codray prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 30) is unreported. The opinion of the Court of Appeals (R. 33) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 15, 1953. (R. 42) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether Section 5(b) of the Trading With the Enemy Act authorizes the Attorney General to keep Hungarian World War II enemy assets in a blocked status to avoid payment of American creditor claims in accordance with Section 34 of the Act.

II. Whether the Treaty of Peace with Hungary preserved or terminated the application of Section 34 of the Act to blocked Hungarian World War II enemy assets.

STATUTE AND TREATY INVOLVED

The pertinent statutory and treaty provisions are printed in the Appendix, *infra*, pp. 10-13.

STATEMENT

Under date of June 27, 1950, the Attorney General, pursuant to Section 34 of the Act,[1] determined that petitioner had a debt claim in the amount of $56,620.50, exclusive of interest, recoverable from any vested assets of United,[2] a Hungarian enemy corporation. (R. 14-15) There was also another approved creditor claim against United.[3] The vested assets of United, then being liquidated under Section 34, totaled only $37,457.35. Accordingly, a *pro rata* distribution[4] was made and petitioner received his

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[1] Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. 1 et seq., as amended by Act of August 8, 1946, 60 Stat. 925, 50 U.S.C. App. 34. (App., p. 10)

[2] United Incandescent Lamps and Electrical Company.

[3] Wells Fargo and Union Trust Company was found to have an allowable claim in the amount of $10,049.39. (R. 14)

[4] In accordance with priorities fixed by Section 34(g) of the Act.

share, $28,560.83,[5] leaving unrecovered a balance of $28,059.67, exclusive of interest. (R. 15-16)

At the time of this distribution, unknown to the petitioner, other assets of United totaling at least[6] $207,000 were being kept by the Attorney General in a blocked status under Section 5(b) of the Act, as amended. 55 Stat. 839, 50 U.S.C. App. 5(b). (App., p. 10)

When the petitioner discovered these blocked assets, the petitioner levied an attachment against these assets and obtained judgment[7] against United in the Supreme Court of the State of New York.[8] (R. 17-19) Thereupon, the petitioner applied to the Attorney General for a license authorizing the payment of the amount of his judgment from the blocked assets of United. This application was denied on April 4, 1952. (R. 20) The reason given for the denial was that the disposition of blocked Hungarian property "is subject to determination of over-all governmental policy." (R. 20) Upon the petitioner's request for

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[5] The share received by Wells Fargo was $1,405.05. (R. 15) The balance of $7,491.47 had been first taken by the Custodian to cover taxes, if any, and expenses. (R. 13)

[6] The discovery of blocked assets is left to the diligence of creditors. The Attorney General may know of the existence of other blocked assets of United It is his policy to keep data on blocked assets secret. In this case the blocked assets of United consist of 13,500 shares of common stock of International Telephone & Telegraph Corporation, with a market value of about $200,000, held by J. P. Morgan Co., of New York City, and a cash balance of $7,000 in an account held by the Guaranty Trust Co., of New York City.

[7] The judgment is in the amount of $62,219.86, this sum being the allowed claim of $56,620.50 under Section 34, plus interest, and minus the payment made to the petitioner against this debt by the Attorney General. (R. 18-19)

[8] The attachment and judgment, still valid, are of the same type as those considered by this Court in *Orvis* v. *Brownell*, 345 U.S. 183, and the *Zittman Cases*, 341 U.S. 446; 341 U.S. 471.

reconsideration, the application was, on April 30, 1952, again denied. This time, the Attorney General in addition made reference to Article 29 of the Treaty of Peace with Hungary. (R. 21-22)

The Treaty of Peace with Hungary, 61 Stat., Part 2, 2109, which was concluded by the Allied Powers, became effective on September 15, 1947. Article 29 of the Treaty (App. p. 12) preserved the authority of our Government to seize and dispose of any Hungarian assets which had been caught in this country up to the time of the treaty. With respect to these Hungarian World War II enemy assets,[9] Article 29 provided that: (1) "The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned", and (2) the United States could use these enemy assets "within the limits of its claims and those of its nationals * * * including debts."

The petitioner, on May 28, 1952, brought this action in the District Court for the District of Columbia to obtain an Order directing the Attorney General at his election either to license payment from the blocked assets of United in an amount sufficient to pay petitioner's claim or to vest and pay petitioner's claim in accordance with the determination theretofore made under Section 34 of the Act. (R. 8-9) Each of the parties moved for summary judgment. The petitioner contended that under the plan of the Act, the Attorney General was required to use his blocking authority under Section 5(b) to accomplish and not to avoid the program of Congress provided in Section 34 of the Act.

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[9] Assets of Hungarian nationals which have come into this country since the Treaty are permitted to circulate freely and are not involved in this case. General License No. 94, issued December 7, 1945, 10 F.R. 14814, accompanied by Press Release No. 76 of the same date.

The District Court found the action was one against the sovereign to which it had not consented. (R. 30-31) The Court of Appeals found that jurisdiction would lie if petitioner's construction of the Act were correct. (R. 36) The Court of Appeals, however, affirmed the District Court on two grounds. It found, one, that the exercise of the authority to block under Section 5(b) was a "governmental" function which the Attorney General in his discretion could use either to accomplish or defeat the plan of Section 34, and, two, that even if the Attorney General had chosen to exercise his discretion to accomplish that plan, the Treaty of Peace with Hungary had terminated his authority to dispose of "blocked" Hungarian enemy assets under the Act. (R. 33-41)

REASONS FOR GRANTING THE WRIT

1. The Question Presented Under The Act And The Treaty Are of General Importance.

The Act embodies permanent legislation. Its provisions automatically come into effect with a declaration of war and automatically apply to all enemy assets. Questions concerning its construction are almost certain to recur. *Markham* v. *Cabell,* 326 U.S. 404, 413-415.

Article 29 of the Treaty of Peace with Hungary is wholly executory. Moreover, each of the other peace treaties, thus far made by the United States with World War II enemy countries,[10] contains a provision identical with, or similar to, Article 29.

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[10] Italy, Article 79, 61 Stat., Part 2, 1245 (1947); Bulgaria, Article 25, 61 Stat., Part 2, 1915; Rumania, Article 27, 61 Stat., Part 2, 1757; Japan, Article 14, U.S. Code Cong. Serv., 1951, p. 2730. In the cases of Bulgaria, Rumania, and Japan, as with Hungary, these articles are wholly executory. In the case of Italy, the blocked assets have been released, but only after Congress amended Section 32 of the Act to provide for the release.

The questions of construction presented are basic to our Government's program for administering blocked World War II enemy assets. In Section 34 of the Act Congress has laid down its plan for granting a preference in an equitable manner to the payment of American pre-war creditor claims out of enemy assets. The Court below holds that, under Section 5(b) of the Act, the Attorney General has an untrammeled and completely discretionary authority to disregard this plan in his administration of that portion of enemy assets which are blocked. The Court below holds in effect that the Attorney General may exercise the blocking authority to confine the operation of Section 34 to such enemy assets as he, in his discretion, may choose to vest. Clearly, if the blocking authority may be used in this manner, the Attorney General has the power to make a mockery out of Section 34. Moreover, if the blocking authority in Section 5(b) of the Act may be used at the choice of the Attorney General to defeat Section 34 of the Act, by precisely the same reasoning and authority the Attorney General may at his choice "block" the carrying out of Sections 9(a), 32, and 39 of the Act. Indeed, the view of the blocking authority taken by the Court below, and by the Attorney General in this case, would give to the Attorney General the power to avoid every provision that Congress has placed in the Act for the ultimate disposition of enemy assets.

Article 29 of the Treaty of Peace with Hungary was intended to preserve the authority of our Government to control and dispose of Hungarian blocked enemy assets "in accordance with the law" of the United States. The petitioner contends that the Act embodies the law of the United States referred to in the Treaty. But the Court below found to the contrary that Article 29 of the Treaty terminated the Act's applicability to the disposition of blocked Hungarian assets. It is well settled that the Act is the sole grant of power to the Executive to block, seize and dispose of enemy assets. *Guessefeldt* v. *McGrath*, 342

U.S. 308; *Silesian-American Corporation* v. *Clark,* 332 U.S. 469; *Brown* v. *United States,* 8 Cranch (U.S.) 110. Accordingly, under the decision below, there is now no applicable legislation, and the Executive branch is presently powerless to administer blocked World War II Hungarian assets. Since provisions analagous to Article 29 of the Hungarian Treaty are contained in each of our World War II peace treaties, under the decision below the Executive Branch is presently without power to administer virtually all World War II blocked enemy assets.

The amounts involved are large. In the case of Hungarian enemy property, out of a total of $6,412,644, there has been vested only $1,477,000, leaving still blocked a balance of $4,935,644. In the case of Bulgarian enemy property, out of a total of $3,320,199, there has been vested only $527,000, leaving still blocked a balance of $2,793,199. In the case of Rumanian enemy property, out of a total of $24,952,410, there has been vested only $924,000, leaving still blocked $24,028,410. Supplementary Report of War Claims Commission, 83d Cong., 1st Sess., H. Doc. No. 67, pp. 36, 156. Thus, in the case of these three former enemy countries alone, a total of $31,757,253 is still being kept blocked under the Act, awaiting seizure and distribution. Figures on Japanese blocked assets are not available to the Petitioner, nor is the Petitioner able to say how many creditor claims under Section 34 of the Act are being thwarted by the practice of the Attorney General that is validated by the decision below.

2. The Construction of the Act By the Court Below Runs Counter To Prior Decisions of This Court And To the Prior Administrative Construction of the Act.

This Court has often enunciated the principle that each separate provision of the Act must be read in the light of the full plan of the Act. *Guessefeldt* v. *McGrath,* 342 U.S. 308; *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480.

In construing the blocking authority under Section 5(b) as a separate, self-contained and all-powerful authority unrelated to Section 34 of the Act, the Court below has failed to give proper effect to the decisions of this Court. *Orvis* v. *Brownell,* 345 U.S. 183; *Propper* v. *Clark,* 337 U.S. 472, *Clark* v. *Uebersee Finanz-Korp., supra.*

The decision below also runs counter to the Act's prior administrative construction. This is illustrated by the following interchange which took place when the provisions which were later enacted into Section 34 were under consideration in Congress:

> Congressman Celler: "If property held by the Alien Property Custodian is not sufficient to pay debt claims against the property held by the Alien Property Custodian, is there any reason why property controlled by the Treasury should not also be made available for the payment of those claims?"
>
> Mr. Luxford: "No, Sir."
>
> Congressman Celler: "And you will make it available?"
>
> Mr. Luxford: "Yes, Sir. * * *" (Testimony of Mr. Luxford, Assistant General Counsel of the Treasury Department, Hearings on H.R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 78th Cong., 2d Sess., (1944) p. 107.

Mr. Luxford's answer is consistent with often repeated administrative declarations under the Act, each similarly representing that the power to block enemy assets is to be used to implement the directives of Congress for the disposition of enemy assets.[11] The view of the Attorney General in this case, and the ruling of the Court below, stand in sharp conflict with these prior administrative declarations.

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[11] Annual Report of the Office of Alien Property Custodian for Year Ending June 30, 1946, at page 8. Treasury Department, Press Service, No. S-337, May 20, 1947. Treasury Department, Press Service No. S-599, January 16, 1948.

3. The Construction By the Court Below of Article 29 of the Treaty Runs Counter To Prior Administrative Construction.

The Attorney General, for four consecutive years after the ratification of the Hungarian Treaty, has announced that Article 29 continued in effect his power under the Act to vest Hungarian assets blocked during the War, which power, as he explained, he was suspending solely "as a matter of policy." Annual Report of the Office of Alien Property, 1947, p. 2, ftn. 6; 1948, p. 2; 1949, p. 2; 1950, p. 2. The conclusion of the Court below denies that the Treaty continued any authority to vest such assets under the Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted:

DAVID COBB
Counsel for Petitioner

December , 1953.

APPENDIX

1. Trading with the Enemy Act, C. 106, 40 Stat. 411, as amended, 50 U.S.C. App. 1 et seq.:

* * * *

Sec. 5.

(b)

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *.

Sec. 34

(a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to Decem-

ber 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this Section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act [sections 1-6 and 7-39 of this Appendix] and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act [said sections], as amended, sections 1-6 of the Criminal Code, title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934, (ch. 327, 52 Stat. 631), as amended [sections 611-621 of Title 22]; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October 17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390 [sections 781-785 of this Appendix]). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act [section 21 of this title]; and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than

persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

* * * *

2. Treaty of Peace With Hungary, effective September 15, 1947 (61 Stat., Part 2, 2109):

* * * *

Article 29

1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

2. The liquidation and disposition of Hungarian property shall be carried out in accordance with the law of the Allied or Associated Power concerned. The Hungarian owner shall have no rights with respect to such property except those which may be given him by that law.

3. The Hungarian Government undertakes to compensate Hungarian nationals whose property is taken under this Article and not returned to them.

4. No obligation is created by this Article on any Allied or Associated Power to return industrial property to the Hungarian Government or Hungarian nationals, or to include such property in determining the amounts which may be retained under paragraph 1 of this Article. The Government of each of the Allied and Associated Powers shall have the right to impose such limitations, conditions and restrictions on rights or interests with respect to industrial property in the territory of that Allied or As-

sociated Power, acquired prior to the coming into force of the present Treaty by the Government or nationals of Hungary, as may be deemed by the Government of the Allied or Associated Power to be necessary in the national interest.

5. The property covered by paragraph 1 of this Article shall be deemed to include Hungarian property which has been subject to control by reason of a state of war existing between Hungary and the Allied or Associated Power having jurisdiction over the property, but shall not include:

(a) Property of the Hungarian Government used for consular or diplomatic purposes;

(b) Property belonging to religious bodies or private charitable institutions and used for religious or charitable purposes;

(c) Property of natural persons who are Hungarian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Hungarian property which at any time during the war was subjected to measures not generally applicable to the property of Hungarian nationals resident in the same territory;

(d) Property rights arising since the resumption of trade and financial relations between the Allied and Associated Powers and Hungary, or arising out of transactions between the Government of any Allied or Associated Power and Hungary since January 20, 1945;

(e) Literary and artistic property rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 493

JACQUES CODRAY, *Petitioner*

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL AND SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 30-31) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 33-41) is reported at 207 F. 2d 610.

JURISDICTION

The judgment of the Court of Appeals was entered October 15, 1953 (R. 42). The petition for

a writ of certiorari was filed December 10, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction of an action to compel the Attorney General, acting under the Trading with the Enemy Act, to issue, at his election, either a license under Executive Order No. 8389, as amended, for the payment of petitioner's claim, or a vesting order with respect to "blocked" assets of petitioner's Hungarian debtor.

2. Whether the Treaty of Peace with Hungary, effective September 15, 1947, authorizes or requires the vesting under the Trading with the Enemy Act of "blocked" assets which are subject to the provisions of the Treaty.

3. Whether, assuming that he is authorized to vest but that the Department of State advises him that it is in the national interest not to vest, the Attorney General is required by the Trading with the Enemy Act to vest "enemy" property for the purpose of paying an American creditor of the enemy debtor under Section 34 of the Act.

STATUTES AND TREATY INVOLVED

Pertinent provisions of the Trading with the Enemy Act are set forth in the Appendix, *infra*, pp. 13-21. Article 26 of the 1947 Treaty with Hungary (61 Stat. (Part 2) 2109), which is not set forth in the Appendix to the petition, appears *infra*, pp. 21-24.

STATEMENT

This action involves property of United Incandescent Lamp & Electrical Co., Ltd. ("United"), a Hungarian corporation. Prior to the "blocking" of Hungarian assets in the United States in 1941, United was indebted to petitioner, the manager of its branch in Paris, France, for unpaid salary and bonuses and on a guarantee against loss with respect to certain shares of stock in the Paris branch.[1]

In 1944 the Alien Property Custodian vested (Vesting Order No. 4220, 9 F.R. 12753) a claim of United against National & Transcontinental Trading Corporation in the amount of $37,457.35 and collected it (R. 3-4). Petitioner filed a claim under the Trading with the Enemy Act against the vested assets of United, and on June 27, 1950, his claim was allowed under Section 34 of the Act as a debt claim in the amount of $56,620.50 (R. 11-15). After deductions for administrative expenses and taxes and partial payment of another debt claim, petitioner was paid $28,560.83, thus exhausting the vested fund.

Thereafter, petitioner discovered other assets of United, valued at over $200,000, which were "blocked" but had not been vested, and on January 9, 1951, he attached those assets in a suit in the state court in New York to recover the unpaid portion of his claim (R. 6). In April 1952, an application by petitioner for a license authorizing

[1] See the petitioner's notice of claim filed with the Office of Alien Property, a copy of which was attached to the affidavit of Julian M. Hare, filed on behalf of the respondent in the District Court but not printed in the Record filed in this Court.

the New York sheriff to take possession of the assets was denied by the Director of the Office of Alien Property on the ground that it involved "property in which there is a Hungarian interest, the disposition of which is subject to determination of over-all governmental policy" (R. 20). A reconsideration was denied on April 30, 1952, for the "same reason" and the Director also called petitioner's attention "to the provisions of the treaty of peace with Hungary which recognized that such disposition would be made by the United States Government" (R. 21-22). On May 2, 1952, petitioner obtained a default judgment against United in his New York action for $62,219.86 and costs (R. 17-19).

The Treaty of Peace with Hungary, to which reference has been made, came into effect September 15, 1947, when it was proclaimed by the President (61 Stat. (Part 2) 2109). In Article 26 (*infra*, pp. 21-24), Hungary agreed to compensate nationals of the United States (and of other signatory nations) for war damage to their property in Hungary. Article 29 provided that the United States should have the right to seize Hungarian property within its territory and

> to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts * * * [Petition, p. 12][2]

[2] Hungary agreed to compensate its nationals for property thus seized (Petition, p. 12).

In the present action, petitioner sued for an order to compel the Attorney General, at his election, either to license payment of petitioner's judgment, or, in the alternative, to vest the blocked assets and pay the judgment under Section 34 (R. 8).

The Attorney General moved to dismiss or for summary judgment (R. 29). In support of the motion, affidavits were filed, stating in substance that Hungary has failed to carry out its obligations under the Treaty for the satisfaction of the claims of American nationals; that American nationals have war damage claims, pre-war debt claims, and claims resulting from the nationalization of property which far exceed in amount the dollar value of the blocked assets available in the United States; that no procedures have been established for the application of blocked Hungarian assets to war damage and nationalization claims, and there is doubt as to the adequacy of existing legislation to deal with the situation; that the Departments involved were contemplating a request to Congress for legislation providing a scheme for the distribution of the assets among the several classes of claimants and clarifying the law as to the method of seizure; and that the Department of State had advised the Office of Alien Property that in its opinion it was important to the conduct of the foreign relations of the United States to keep the blocked Hungarian assets in *statu quo* until a general governmental policy should be worked out (R. 22-29).

The District Court granted the motion of the Attorney General (R. 30-31). It held that the action

was against the United States, which had not consented to be sued; that the petitioner's unlicensed attachment and judgment did not constitute a sufficient property interest to entitle him to question the propriety of the Government's action; and that the action of the Attorney General in refusing to license or vest was lawful and within his discretion.

On appeal, the Court of Appeals affirmed. It held that the Trading with the Enemy Act did not provide procedures for carrying out the provisions of the Treaty; that no provision of the Act required the Attorney General to vest or to take affirmative action such as licensing; and that the action was in effect a suit against the United States. (R. 33-41.)

ARGUMENT

Petitioner asserts that this case presents important questions as to the construction of the 1947 Treaty with Hungary and as to the power of the Attorney General to use the authority to "block" foreign assets under the Trading with the Enemy Act to prevent the operation of Section 34 of the Act upon enemy assets in accordance with the intention of Congress. In a proper context, those questions might be important. In the instant case, however, the construction of the Treaty by the court below was clearly correct and the issue which petitioner states as to the connection between the "blocking" authority and Section 34 does not exist. Moreover, petitioner's whole argument is vitiated by his failure to show any basis for the jurisdiction of the courts of the United States.

1. *The District Court Did Not Have Jurisdiction.* The complaint refers to the Fifth Amendment and to four statutes, including the Trading with the Enemy Act,[3] but significantly the petition makes no effort to show that the District Court had jurisdiction under any of them.

What petitioner sought was an order compelling the Attorney General

> at his election either [to] issue a license to the plaintiff authorizing the satisfaction and payment of his judgment against United or [to] vest the property blocked in the name of United * * *.

and then pay plaintiff's claim under Section 34 of the Act (R. 8-9). Under either aspect of the requested order, the Attorney General would be required to act affirmatively on behalf of the United States, for only as an official of the United States can he sign a license or a vesting order. It follows that this is a suit against the United States and must fail unless the petitioner can bring himself within the terms of a consent of the United States to be sued. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691:

> Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief

[3] Petitioner does not attack the original "blocking" of Hungarian property in 1941 by Executive Order No. 8711 (6 F.R. 1443), which amended Executive Order No. 8389 (5 F.R. 1400).

> requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign * * *.

To the same effect see the dissenting opinion in *Larson* (337 U. S. at 712); *Seiden* v. *Larson,* 188 F. 2d 661 (C. A. D. C.), certiorari denied, 341 U. S. 950; and *American Dredging Co.* v. *Cochrane,* 190 F. 2d 106 (C. A. D. C.).

What petitioner seeks is either a license or a vesting order, that is, action on behalf of the United States. He has cited no statute giving the consent of the United States to be sued for such relief, and the courts below rightly held that the action failed for want of jurisdiction. (R. 30, 41.)

2. *The Construction of the Treaty.* The real thrust of petitioner's argument seems to be that the Attorney General, in declining to license payment of petitioner's claim or to vest the "blocked" assets of United, has misconstrued the 1947 Treaty with Hungary (61 Stat. (Part 2) 2109) and the Trading with the Enemy Act. But the theory that error on the part of an officer of the United States will in and of itself suffice as a basis for jurisdiction was rejected by this Court in *Larson* v. *Domestic & Foreign Corp., supra.* Moreover, it is clear that the Attorney General has rightly construed the Treaty and the Act, and that the Court of Appeals was correct in approving his action.

Article 29 of the Treaty (Petition, p. 12) authorizes the United States, as an allied power, to seize Hungarian property which was in the United

States on the effective date of the Treaty, September 15, 1947, and to

> apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts * * *.

This language seems to contemplate the application of Hungarian assets which existed as of September 15, 1947, and which were "blocked" under Executive Order No. 8711 (6 F. R. 1443), to all types of American claims. In addition to "debts" and claims of the United States, the Treaty mentions claims of nationals of the United States for war damage (Article 26, *infra*, pp. 21-24). These claims Hungary agreed to pay. The default of Hungary on this agreement (R. 24, 27) under the Treaty authorizes the United States to apply the "blocked" assets to war damage claims. Also, American nationals have claims against Hungary for nationalization of property (R. 24, 27), and the total amount of all these claims for debts, war damage, and nationalization far exceeds the dollar value of the available assets (R. 24, 28).

But, although the Treaty authorizes the United States to seize the "blocked" assets and to apply them to the claims of its nationals, specific authority is required before any officer of the United States can act. *Brown* v. *United States*, 8 Cr. 110; *Miller* v. *United States*, 11 Wall. 268, 305. The provisions of the Treaty must be implemented. As the Court of Appeals said:

> Impatient individual creditors cannot now assert rights under Article 29. They must wait until implementing machinery has been set up by appropriate governmental action. [R. 39] [4]

Neither the Congress nor the President has yet acted to implement this Article of the Treaty. It is clear that the Trading with the Enemy Act, as it now stands, constitutes no ready-made implementation, for two reasons. First, as already indicated, the Treaty contemplates the payment of all types of claims of United States nationals against nationals of Hungary, at least if the United States so desires. The Act, however, in Section 34(g) (*infra*, p. 19) provides only for the payment of "debts", that is, contract claims (*Robertson* v. *Miller*, 266 U. S. 243) and cannot be applied to tort claims, or to claims for war damage or for nationalization.

Second, the Treaty was a Treaty of Peace and the power to seize enemy property under the Trading with the Enemy Act does not survive the end of the war. *Sutherland* v. *Guaranty Trust Co.*, 11 F. 2d 696 (C. A. 2). Even under the 1941 amendment to the Act, the authority to seize property and retain it as against a suit under Section 9(a) of the Act is restricted to "enemy" prop-

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[4] The assets remain "blocked", however, for the Presidential power to prohibit transactions is effective during any declared period of "national emergency". Section 5(b)(1) (Petition, p. 10). Following the proclamation of an emergency because of the Korean situation (No. 2914, December 19, 1950, 15 F.R. 9029), the "blocking" of Hungarian assets was expressly continued in effect. Executive Order No. 10348, 17 F.R. 3769.

erty. *Clark* v. *Uebersee Finanz-Koporation*, 332 U. S. 480.[5]

In short, if the Trading with the Enemy Act is not applicable, as seems to be the case, there is no statute under which the Attorney General can proceed against the property, and the Court of Appeals so held.

3. *The Construction of the Act.* Petitioner also asserts that the courts below misconstrued the Trading with the Enemy Act and held that the Attorney General may disregard the Congressional plan for the payment of American creditors out of enemy assets and may exercise the "blocking" authority to limit the operation of Section 34 (Petition, p. 6).

This assertion embodies a complete misunderstanding of the decisions below and of the scheme of the Act. The language of Section 34 is clear to the effect that payments thereunder to creditors shall be made only out of property "vested in or transferred to" the Attorney General (as successor to the Alien Property Custodian) or the proceeds thereof (Section 34(a)). And, quite apart from any question of "blocking", it is settled law that the authority to vest is discretionary. *Clark* v. *Allen*, 331 U. S. 503, 511; *Sutherland* v. *Guaranty Trust Co.*, 11 F. 2d 696, 698 (C. A. 2); *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 796 (C. A. 2), affirmed, *sub nom. Silesian-American Corporation* v. *Clark*, 332 U. S. 469; *Blank* v.

[5] No debt claim is to be paid under the Act while a suit or proceeding for the return of the property is pending. Section 34(b) (*infra*, p. 15).

Clark, 79 F. Supp. 373, 377 (E.D. Pa.) The decision to vest being a matter of discretion, the Act does not require that property "blocked" under it shall be vested. *Propper* v. *Clark,* 337 U. S. 472, 483. It may be, in the judgment of the Executive, in the interest of the United States to "block" foreign property but not to vest it, even in a case where the authority to vest is unquestioned. Since, in any event, there is discretion whether to vest, the statement that the "blocking authority * * * may be used * * * to defeat Section 34" (Petition, p. 6) is meaningless.

CONCLUSION

The issues of law presented were decided by the courts below in accordance with the decisions of this Court and there is no conflict of decisions. On the facts of this case, those issues do not call for resolution by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1954.

APPENDIX

1. Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U.S.C. App. 1, et seq.:

SEC. 34. [as added by the Act of August 8, 1946, 60 Stat. 925] (a) Any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, shall be equitably applied by the Custodian in accordance with the provisions of this section to the payment of debts owed by the person who owned such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian. No debt claim shall be allowed under this section if it was not due and owing at the time of such vesting or transfer, or if it arose from any action or transactions prohibited by or pursuant to this Act and not licensed or otherwise authorized pursuant thereto, or (except in the case of debt claims acquired by the Custodian) if it was at the time of such vesting or transfer due and owing to any person who has since the beginning of the war been convicted of violation of this Act, as amended, sections 1-6 of the Criminal Code (18 U. S. C. 1-6), title I of the Act of June 15, 1917 (ch. 30, 40 Stat. 217), as amended; the Act of April 20, 1918 (ch. 59, 40 Stat. 534), as amended; the Act of June 8, 1934 (ch. 327, 52 Stat. 631), as amended; the Act of January 12, 1938 (ch. 2, 52 Stat. 3); title I, Alien Registration Act, 1940 (ch. 439, 54 Stat. 670); the Act of October

17, 1940 (ch. 897, 54 Stat. 1201); or the Act of June 25, 1942 (ch. 447, 56 Stat. 390). Any defense to the payment of such claims which would have been available to the debtor shall be available to the Custodian, except that the period from and after the beginning of the war shall not be included for the purpose of determining the application of any statute of limitations. Debt claims allowable hereunder shall include only those of citizens of the United States or of the Philippine Islands; those of corporations organized under the laws of the United States or any State, Territory, or possession thereof, or the District of Columbia or the Philippine Islands; those of other natural persons who are and have been since the beginning of the war residents of the United States and who have not during the war been interned or paroled pursuant to the Alien Enemy Act (50 U. S. C. 21); and those acquired by the Custodian. Legal representatives (whether or not appointed by a court in the United States) or successors in interest by inheritance, devise, bequest, or operation of law of debt claimants, other than persons who would themselves be disqualified hereunder from allowance of a debt claim, shall be eligible for payment to the same extent as their principals or predecessors would have been.

(b) The Custodian shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. In no event shall the time

extend beyond the expiration of two years from the date of the last vesting in or transfer to the Custodian of any property or interest of a debtor in respect of whose debts the date is fixed, or from the date of enactment of this section, whichever is later. No debt shall be paid prior to the expiration of one hundred and twenty days after publication of the first such notice in respect of the debtor, nor in any event shall any payment of a debt claim be made out of any property or interest or proceeds in respect of which a suit or proceeding pursuant to this Act for return is pending and was instituted prior to the expiration of such one hundred and twenty days.

(c) The Custodian shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property or interest owned by the debtor immediately prior to its vesting in or transfer to the Alien Property Custodian, as shall remain after deduction of (1) the amount of the expenses of the Office of Alien Property Custodian (including both expenses in connection with such property or interest or proceeds thereof, and such portion as the Custodian shall fix of the other expenses of the Office of Alien Property Custodian), and of taxes, as defined in section 36 hereof, paid by

the Custodian in respect of such property or interest or proceeds, and (2) such amount, if any, as the Custodian may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the Custodian, ratable payments shall be made in accordance with subsection (g) hereof to the extent permitted by the money available and additional payments shall be made whenever the Custodian shall determine that substantial further money has become available, through liquidation of any such property or interest or otherwise. The Custodian shall not be required through any judgment of any court, levy of execution, or otherwise to sell or liquidate any property or interest vested in or transferred to him, for the purpose of paying or satisfying any debt claim.

(e) If the aggregate of debt claims filed as prescribed does not exceed the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall pay each claim to the extent allowed, and shall serve by registered mail, on each claimant whose claim is disallowed in whole or in part, a notice of such disallowance. Within sixty days after the date of mailing of the Custodian's determination, any debt claimant whose claim has been disallowed in whole or in part may file in the District Court of the United States for the District of Columbia a complaint for review of such disallowance naming the

Custodian as defendant. Such complaint shall be served on the Custodian. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to the claim in question. Upon good cause shown such time may be extended by the court. Such record shall include the claim as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, and the determination of the Custodian with respect thereto, including any findings made by him. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian, or could not reasonably have been adduced before him or was not available to him. The court shall enter judgment affirming, modifying, or reversing the Custodian's determination, and directing payment in the amount, if any, which it finds due.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) hereof, payment may be made, the Custodian shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the Custodian shall assign priorities in accordance with the provisions of subsection (g) hereof. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved

may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the Custodian as defendant. A copy of such complaint shall be served upon the Custodian and on each claimant named in the schedule. The Custodian, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings in the Office of Alien Property Custodian with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the Custodian or introduced into the record by him, any findings or other determinations made by the Custodian with respect thereto, and the schedule prepared by the Custodian. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the Custodian or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the Custodian pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the Custodian and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) hereof, payment may be made. Pending the decision of the court on

such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

(g) Debt claims shall be paid in the following order of priority: (1) Wage and salary claims, not to exceed $600; (2) claims entitled to priority under sections 191 and 193 of title 31 of the United States Code, except as provided in subsection (h) hereof; (3) all other claims for services rendered, for expenses incurred in connection with such services, for rent, for goods and materials delivered to the debtor, and for payments made to the debtor for goods or services not received by the claimant; (4) all other debt claims. No payment shall be made to claimants within a subordinate class unless the money from which, in accordance with subsection (d) hereof, payment may be made permits payment in full of all allowed claims in every prior class.

(h) No debt of any kind shall be entitled to priority under any law of the United States or any State, Territory, or possession thereof, or the District of Columbia, solely by reason of becoming a debt due or owing to the United States as a result of its acquisition by the Alien Property Custodian.

(i) The sole relief and remedy available to any person seeking satisfaction of a debt claim out of any property or interest which shall have been vested in or transferred to the Alien Property Custodian (other than any property

or interest acquired by the United States prior to December 18, 1941), or the proceeds thereof, shall be the relief and remedy provided in this section, and suits for the satisfaction of debt claims shall not be instituted, prosecuted, or further maintained except in conformity with this section: *Provided,* That no person asserting any interest, right, or title in any property or interest or proceeds acquired by the Alien Property Custodian, shall be barred from proceeding pursuant to this Act for the return thereof, by reason of any proceeding which he may have brought pursuant to this section; nor shall any security interest asserted by the creditor in any such property or interest or proceeds be deemed to have been waived solely by reason of such proceeding. The Alien Property Custodian shall treat all debt claims now filed with him as claims filed pursuant to this section. Nothing contained in this section shall bar any person from the prosecution of any suit at law or in equity against the original debtor or against any other person who may be liable for the payment of any debt for which a claim might have been filed hereunder. No purchaser, lessee, licensee, or other transferee of any property or interest from the Alien Property Custodian shall, solely by reason of such purchase, lease, license, or transfer, become liable for the payment of any debt owed by the person who owned such property or interest prior to its vesting in or transfer to the Alien Property Custodian. Payment by the Alien Property Custodian to any

debt claimant shall constitute, to the extent of payment, a discharge of the indebtedness represented by the claim.

* * * * *

2. Treaty of Peace with Hungary, effective September 15, 1947, 62 Stat. (Part 2) 2109:

* * * * *

Article 26

1. In so far as Hungary has not already done so, Hungary shall restore all legal rights and interests in Hungary of the United Nations and their nationals as they existed on September 1, 1939, and shall return all property in Hungary of the United Nations and their nationals as it now exists.

2. The Hungarian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Hungarian Government in connection with their return. The Hungarian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between September 1, 1939, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Hungarian authorities not later than

twelve months from the coming into force of the Treaty, except in cases in which the claimant is able to show that he could not file his application within this period.

3. The Hungarian Government shall invalidate transfers involving property, rights and interests of any description belonging to United Nations nationals, where such transfers resulted from force or duress exerted by Axis Governments or their agencies during the war.

In the case of Czechoslovak nationals, this paragraph shall also include transfers after November 2, 1938, which resulted from force or duress or from measures taken under discriminatory internal legislation by the Hungarian Government or its agencies in Czechoslovak territory annexed by Hungary.

4. (a) The Hungarian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Hungary, he shall receive from the Hungarian Government compensation in Hungarian currency to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Hungarian nationals.

(b) United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9(a) of this Article, but which have suffered a loss by reason of injury or damage to property in Hungary, shall receive compensation in accordance with sub-paragraph (a) above. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.

(c) Compensation shall be paid free of any levies, taxes or other charges. It shall be freely usable in Hungary but shall be subject to the foreign exchange control regulations which may be in force in Hungary from time to time.

(d) The Hungarian Government shall accord to United Nations nationals the same treatment in the allocation of materials for the repair or rehabilitation of their property in Hungary and in the allocation of foreign exchange for the importation of such materials as applies to Hungarian nationals.

(e) The Hungarian Government shall grant United Nations nationals an indemnity in Hungarian currency at the same rate as provided in sub-paragraph (a) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Hun-

garian property. This sub-paragraph does not apply to a loss of profit.

5. The provisions of paragraph 4 of this Article shall apply to Hungary in so far as the action which may give rise to a claim for damage to property in Northern Transylvania belonging to the United Nations or their nationals took place during the period when this territory was subject to Hungarian authority.

6. All reasonable expenses incurred in Hungary in establishing claims, including the assessment of loss or damage, shall be borne by the Hungarian Government.

7. United Nations nationals and their property shall be exempted from any exceptional taxes, levies or imposts imposed on their capital assets in Hungary by the Hungarian Government or any Hungarian authority between the date of the Armistice and the coming into force of the present Treaty for the specific purpose of meeting charges arising out of the war or of meeting the costs of occupying forces or of reparation payable to any of the United Nations. Any sums which have been so paid shall be refunded.

8. The owner of the property concerned and the Hungarian Government may agree upon arrangements in lieu of the provisions of this Article.

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